

STATE OF INDIANA)	IN THE MORGAN CIRCUIT COURT
) SS:	
COUNTY OF MORGAN)	CAUSE NO: 55C01-1106-MI-1254
IN RE THE FORMATION OF)	
THE LAKE DETURK)	
CONSERVANCY DISTRICT)	
)	Natural Resources Commission
)	Administrative Cause
)	Number: 11-138C

RECOMMENDED
REPORT OF THE NATURAL RESOURCES COMMISSION
WITH RESPECT TO THE PETITION FOR THE ESTABLISHMENT OF THE
LAKE DeTURK CONSERVANCY DISTRICT

I. PETITION, SUMMARY OF EVIDENCE RECEIVED AT PUBLIC HEARING

A. Petition

On August 15, 2011, the Natural Resources Commission (the “Commission”) received a copy of the Petition for the Creation of the Lake DeTurk Conservancy District (the “Petition”). A conservancy district may be established for any purpose set forth in Ind. Code §14-33-1-1(a). The Petition lists the purpose for which the conservancy district is proposed as (1) developing forests, wildlife areas, parks, and recreational facilities if feasible in connection with beneficial water management; and (2) operation, maintenance, and improvement of a work of improvement for water based recreational purposes including, but not limited to Lake DeTurk and the Lake DeTurk dam and spillway.

On August 12, 2011, Michael Ice, Judge Pro Tem, Morgan Circuit Court, entered an order referring the Petition to the Natural Resources Commission, in substantive part, as follows:

ENTRY AND ORDER REFERRING PETITION FOR THE CREATION OF THE LAKE DETURK
 CONSERVANCY DISTRICT TO THE NATURAL RESOURCES COMMISSION

...

4. All of the land described in the Petition lies within Morgan County, Indiana and therefore this Court has jurisdiction.

...

8. The Petition bears the signatures of more than thirty (30) percent of the freeholders owning land within the proposed conservancy district and complies with the requirements of the Indiana Code as to form and content.

...

10. The Petition meets all requirements set for in I.C. 14-33-2-4 and I.C. 14-33-2-16 and shall be referred to the Natural Resources Commission for hearing, determination and report, as required by I.C. 14-33-2-17(b).

...

12. The Natural Resources Commission shall make a determination in respect to the Petition in accordance with I.C. 14-33-2-17.

13. The Natural Resources Commission shall file a report with the Court in accordance with I.C. 14-33-2-22 and within 120 days of the date of this Order.

As a consequence of the Court's referral, on August 29, 2011 the Commission circulated letters to state and local governments for comment.

Under the Morgan Circuit Court Order and Ind. Code § 14-33-2-19, a public hearing was held as scheduled on September 26, 2011, in the Morgan County Administration Building, 180 South Main Street, Lucille Sadler Room Martinsville, Indiana. Notice of the public hearing was published on September 1, 2011 in *Martinsville Reporter Times*, a newspaper of general circulation in Morgan County. A notice of the public hearing was also posted to the Commission's Web-based calendar accessible at <http://www.in.gov/nrc/2307.htm>.

B. Summary of Evidence Received at Public Hearing

Jennifer M. Kane was appointed as the Commission's hearing officer. Kane opened the public hearing as scheduled on September 26, 2011 to receive comments on the proposed Lake DeTurk Conservancy District. She outlined the statutory responsibilities of the Commission pertaining to the review of a proposed conservancy district petition. Attending the public hearing were Peter R. Foley, attorney for the Petitioners; Terri Price and Brandon Mescall from the Department of Natural Resources, Division of Water. Approximately 20 other persons were in attendance.

The Hearing Officer called upon Peter Foley to present evidence in support of the Petition.

Petitioner Supporting Evidence

Attorney Foley introduced the following exhibits:

Petitioners' Exhibit 1: Affidavit of Morgan County Auditor; Attachment, Exhibit A: Real Property Maintenance Report;

Petitioners' Exhibit 2: Settlement Agreement (signed and dated November 29, 2010) Attachment: Water Lease Contract (signed and dated November 29, 2010);

Petitioners' Exhibit 3: Lake DeTurk Proposed Conservancy District Map¹ dated June 15, 2011;

Petitioners' Exhibit 4: Nine color photographs (A through I) depicting Lake DeTurk, and recreational areas within the proposed district boundaries;

Petitioners' Exhibit 5: Letter from Joseph W. and Mary E. Krutulis (dated September 4, 2011);

Petitioners' Exhibit 6: Letter from David McSwane (dated September 23, 2011);

Petitioners' Exhibit 7: Lake DeTurk Conservancy District Cost Benefit Analysis completed by Stephen L. Cobb;

Petitioners' Exhibit 8: Lake DeTurk Dam Inspection Report (dated November 1, 2007); and

Petitioners' Exhibit 9: Engineer's Report (dated October 17, 2011); Exhibit A: map of proposed conservancy district boundaries including dam and spillway (dated October 17, 2011)

Counselor Foley provided brief background regarding the Petition. He said the proposed Lake DeTurk Conservancy District boundary encompasses the plats of Shireman Estates, which is a residential subdivision incorporated within the City of Martinsville. Shireman Estates consists of approximately 322 residential lots. The approximate 35-acre Lake DeTurk, dam, and areas adjacent to the dam that are necessary for repair, maintenance, of the dam itself, including the toe of the dam, principal spill way and emergency spillway, have not been incorporated into Martinsville's city limits. Foley noted that the proposed district boundary map attached to the Petition does not contain a meets and bounds description of the survey line that will encompass the area of the dam and associated appurtenances. Ozark Fisheries, Inc. owns several lots within Shireman Estates, Lake DeTurk, and the dam and spillway. The Petitioners are working with Ozark Fisheries to establish the survey line.

Counselor Foley noted that on October 18, 2000, a group of owners of real estate located in Shireman Estates subdivision ("Plaintiffs") filed a class action lawsuit in the Morgan Circuit Court (Cause No. 55C01-0010-CP-490) against Ozark Fisheries, Incorporated ("Ozark"). "In a general sense, the residents filed the class action and requested that the Morgan Circuit Court hold Ozark liable for repair and maintenance of the dam and lake, and amenity areas; the right to use those amenity areas; and that it be maintained and cared for in perpetuity by Ozark."

¹ The Petitioners' attorney noted that Petitioners' Exhibit 3 did not contain a meets and bounds description for inclusion of the Lake DeTurk dam and spillway. On October 19, 2011 the Petitioners' attorney filed Petitioners' Exhibit 9, Engineer's Report with attached Exhibit A, an updated map that includes the meets and bounds of the associated dam and spillways.

In 1970, Ozark, a Missouri corporation, acquired Grassyfork Fisheries Co., Inc., located in Morgan County, Indiana, and is sole shareholder. Grassyfork Fisheries later became known as Ozark Fisheries, Inc. In addition to the acreage associated with the fisheries operation proper, additional acreage owned by Ozark was subsequently developed into Shireman Estates by Missind Development Corporation (“Missind”), an Indiana real estate development company. As part of the development of Shireman Estates, Missind represented that it would maintain Lake DeTurk and its amenities for the benefit of the residents of Shireman Estates. “The marketing of the residential subdivision was in contrast to a couple of other competing residential subdivisions, such as Fox Cliff and Painted Hills, in that the owners, the residents would not have that obligation to maintain the lake and dam, and a homeowners association was not established.” Foley noted that the maintenance agreement “worked well for a number of years until the 1990s and 2000. The maintenance of those amenities no longer met the expectation of the residents, which generated the filing of the lawsuit and the dispute over who would have that obligation.”

Counselor Foley said that on November 29, 2010 a settlement agreement (“Settlement Agreement”) was reached between the Plaintiffs and Ozark, and approved by the Morgan Circuit Court early 2011. An agreement was reached between the parties, which set forth that the Plaintiffs file a petition with the Morgan Circuit Court to create the Lake DeTurk Conservancy District. The land that makes up Lake DeTurk proper, the dam, and the amenity areas would be conveyed by Ozark to the conservancy district once successfully completed. The district would then hold maintenance and ownership obligations of the dam and lake. “This was viewed to be the only viable option as there were no pre-existing covenants or other infrastructure to have a collective group of the residents maintain and be able to assess, or otherwise fairly distribute, the cost of maintaining the lake and the dam and any of the amenities.”

Foley stated that Ozark has represented that the continued maintenance of the dam, the lake, and the recreational amenities “is not in its financial best interest. It’s essentially a loss to the business. It is an additional cost that its business incurred that provides no business purpose for them.” Foley also noted that Lake DeTurk is used by Ozark solely as a water source to gravity feed fish ponds located below the dam. “Otherwise the amenities and any of the other maintenance of the lake for any recreational qualities or maintenance of the lake for purpose of preserving property value are not aligned between Ozark and the residents.”

Foley explained that the Settlement Agreement required Ozark to place in escrow \$35,000 in cash, which was paid to the Clerk of the Morgan Circuit Court. The escrow funds would be transferred to the established conservancy district as an asset. He explained that Ozark and the Plaintiffs signed a water use agreement (“Water Lease Contract”) on November 29, 2010. The Water Lease Contract is to be executed by and between Ozark and Lake DeTurk Conservancy District. The Water Lease Contract provides that: (1) Ozark retain ability and right to use water from Lake DeTurk for the gravity feed of its ponds; however, those water rights are to be subject to maintenance restrictions on behalf of the residents of Shireman Estates; and (2) any drawdown of Lake DeTurk by Ozark is restricted to not more than three feet below the normal pool stage of Lake DeTurk. Foley noted that Lake DeTurk’s normal pool stage “was generated through the brochures, and I think in the covenants that Ozark maintained at the beginning of the development and incorporated as a term in the Settlement Agreement.

Counselor Foley said that along with the Petition, Petitioners' Exhibit 1 was filed in Morgan Circuit Court. Petitioners' Exhibit 1 represents that the freeholders of the proposed conservancy district are those residents of properties platted as Shireman Estates, plus one meets and bounds (unplatted) parcel of .78 acres, common address of 145 Ferguson Drive, and owned by David and Vicky Guist. Foley entered Petitioners' Exhibit 3, also filed with the Petition, and depicts the proposed conservancy district boundaries, which include lots owned by Ozark and located within Shireman Estates (96, 97, 98, 171, 172, 173, 337, 338, 346, and 351). Ozark would deed these lots to the established conservancy district. Foley noted that Petitioners' Exhibit 3 did not contain the meets and bounds description and survey line for Lake DeTurk, the dam and associated spillway. Foley stated that a revised district boundary map that included these areas would be filed with the Hearing Officer.

Counselor Foley stated, "We believe that we meet the legal and lawful requirements under the statute for the establishment of the conservancy district. In filing our petition, there were 248 freeholders, 124 signed on in support of the petition." The purposes of the conservancy district are (1) developing forests, wildlife areas, parks, and recreational facilities if feasible in connection with beneficial water management; and (2) operation, maintenance, and improvement of a work of improvement for water based recreational purposes including, but not limited to Lake DeTurk and the Lake DeTurk dam and spillway. Foley stated that the recreational aspects that Lake DeTurk and any of the amenities in Shireman Estates provided to the residents would be private. "In other words, the conservancy district would own the lake and the amenities for the use and benefit of its members. The conservancy district would be responsible for the maintenance of Lake DeTurk, Lake DeTurk dam, and spillways.

Counselor Foley said Ozark currently owns Lake DeTurk, the dam and spillway, and several lots within Shireman Estates. "It is no longer in Ozark's business and financial best interest to maintain the lake and dam in perpetuity. If there are problems and there are any regulatory or enforcement issues, then those problems could be remedied and resolved by removing the dam and the lake itself. It's no longer an asset for Ozark or provides benefit for its bottom line and business purposes. Ozark has a fiduciary duty to its own shareholders not to invest in something that is not economically feasible for them. If Ozark doesn't care for the lake in perpetuity, who will? Therefore, the district is necessary."

Counselor Foley stated that the conservancy district holds promise of economic and engineering feasibility. "It is well within the abilities of the residents and the district to maintain and take care of the dam and lake itself. We are not in a situation of a dam crisis, as are other lakes in the region, but there are normal and customary maintenance and maybe some deferred maintenance that does need to be performed." He stated that evidence will be presented to supporting that the district offers benefit in excess of costs and damages. Testimony will be provided from Steve Cobb, an appraiser and a valuation expert, to indicate that the potential damages of dewatering Lake DeTurk and loss of recreational amenities could potentially reach \$4 million in loss in property value. Foley said the estimated maintenance costs are approximately \$1.5 million. "So the ratio is favorable, the benefits exceeding the costs." Foley stated that the proposed district covers and serves a proper area, and can be established and operated in a manner compatible with other water management projects in the area. "We feel we meet all of those requirements."

Attorney Foley then introduced William R. Keller, Stephen Cobb, Ross Holloway, and Larry Cleveland to testify in favor of the Petition. Their testimony is summarized² as follows:

William R. Keller, a freeholder within the proposed conservancy, and a resident of Shireman Estates since May 2002, stated that he is a lifelong resident of Martinsville and owns and operates Keller's Office Supply located in Martinsville. Keller holds a CPA license, and has practiced as a real estate residential appraiser for approximately five years. Keller stated that he was active in the resident committee involved in the class action lawsuit, as well as the petition for the conservancy district. "It is my firm opinion that property values will continue to decline if the conservancy district is not granted. I think they've declined already just in terms of the nominal conditions and whatnot. The lake will continue to deteriorate making the neighborhood less marketable. That's my primary concern."

Keller said he has made improvement to his residence; however, a pier was installed prior to his ownership. He stated that lake frontage was a desirable aspect when he purchased the Shireman Estate property. "It's a beautiful setting, and we enjoy the lake view... We put in an in-ground swimming pool at the back of our house about two years after we moved in. Keller testified that he took the photographs entered into the record as Petitioners' Exhibit 4(A-I). Keller explained that Petitioners' Exhibit 4C is a photograph of his dock on Lake DeTurk, patio and swimming pool area. "The shore opposite in the picture shows exposed bank... In the springtime, with all the rain we usually get, it's very full and it's beautiful. I always look at the steps on my dock; that's kind of my gauge for the level of the lake water. In the last three to four years in the spring you could barely see the first step on our dock. But then by late August you can usually see six so that is a good four to five feet drop in the water level. Once it gets down to that fifth or sixth step you can really notice that's when the northwest end of the lake will dry out and become a mud bed and things become not very nice to look at... cattails, other weeds".

Keller described the condition of the tennis courts, baseball field, and playground. He noted that Petitioners' Exhibit 4A shows the current condition of the tennis courts that were installed during the original development, and explained that the courts are now unusable. Petitioners' Exhibit 4B is "what used to be a baseball field. The fence that makes up the backstop is still there, although it is in need of repair and is just not in very good condition." Petitioners' Exhibit 4D depicts the east side shoreline of Lake DeTurk. "I took the photo to show how the level of water has dropped significantly and is well below the spillway in the area of the dam." Petitioners' Exhibit 4E is a picture of the basketball court "that has a small pavement area, but grass is growing through cracks. Again, it doesn't look very good or look appealing. It needs some repair and needs some work." Petitioners' 4F is a picture of the northwest end of Lake DeTurk "where the water level drops the most, and it is most noticeable and is currently pretty much a mudflat there". Petitioners' Exhibit 4G is a picture of the area by the dam "showing how the water level is down significantly." Petitioners' 4H is a view of the playground area at Hill View and Byron Boulevard "just showing the swing sets and slide that I assume are from the 1970s when the development began." Petitioners' Exhibit 4I is a picture of the northwest end of Lake

² Statements made at the September 26, 2011 public hearing that are identified with quotation marks are intended to set off direct quotations. The audio quality of the recording was not always pristine. As a result, the statements should be considered as summaries and not as verbatim.

DeTurk “where there are is a dock currently and basically a mudflat. It is taken from the backyard of a house ...He has a dock there at the back of his house is currently unusable, because there is no water there. I guarantee you that the market value of that home has been affected.”

Keller indicated that he supports the petition “mainly so that the residents can take control of our neighborhood and control and maintaining our property value. Maintaining control of who uses the amenities. I have had experience to witness on several occasions teenagers hanging out...and on three or four occasions fights have broken out. I have had to call the police just to kind of break things up. So, being able to kind of maintain security out there is another reason. The residents do not have any lawful ability to use the lake or amenities since Ozark owns the lake and other areas. It’s private property that does not belong to Shireman Estates, so we have no say so on who can be removed from there. If the property were ever transferred away from Ozark, like right now the use of the lake is because Ozark allows the residents to do that. It’s Ozark’s lake and suppose if they so wish, they could prevent anyone from using the lake at its current state. Keller stated that he believes that the costs to maintain Lake DeTurk through assessments to be borne by the residents are reasonable in regard to the benefits that will be provided. He said that if the lake was no longer there, his property value would decline.

Keller noted that the tennis courts and baseball field are generally found on Lots 96, 97, and 98; the playground area and the basketball court are located on lots 171, 172, and 173; and a beach area is located at lots 337 and 338, where at one time a dock existed where residents could tie up small fishing boats. “But over the years the beach has overgrown primarily and is no longer used by residents. Keller noted that boats with electronic motors only are allowed on Lake DeTurk. Keller said Petitioners’ Exhibits 4F and 4I are pictures of the north end of the Lake DeTurk, lots 346 and 351.

Stephen L. Cobb, stated that he has been the principal and owner for 40 years of Real Property Evaluation (RPE Cobb & Associates), located in Greenwood, Indiana. He is a graduate of Indiana University, majoring in real estate; holds a MAI³ designation by the Appraisal Institute, a member of the Indianapolis Board of Realtors, Bloomington Board of Realtors, and several other boards of realtors. Cobb also stated that he is an Indiana certified general appraiser and a licensed real estate broker. He was Director of Real Estate for Indiana University-Purdue University (IUPUI, Indianapolis) from 1970 to 1989, and managed all real estate holdings, both on campus and off campus, for IUPUI. As part of his employment with IUPUI, Cobb was involved in numerous rental properties, acquired all real estate for IUPUI and numerous other tasks as assigned. “Principally, I was in charge of acquiring the properties that later became the IUPUI campus on the west side of Indianapolis.”

Cobb explained his methodology in preparation of Petitioners’ Exhibit 7, the Cost Benefit Analysis for Lake DeTurk Conservancy District (“Cost Benefit Analysis”). The Cost Benefit Analysis included data collected from the Metropolitan Board of Realtors. “I pulled up all the listings that were available around [Lake DeTurk] and isolated those. I then pulled up all the

³ The MAI membership designation is held by appraisers who are experienced in the valuation and evaluation of commercial, industrial, residential and other types of properties, and who advise clients on real estate investment decisions. See <http://www.appraisalinstitute.org/designations/>.

listings and sold properties in Shireman Estates and analyzed those from an economic standpoint or sales per property analysis.” Cobb said he ascertained from the data that properties adjacent to Lake DeTurk and within Shireman Estates sold for approximately \$200,000 or greater, and the properties not located adjacent to Lake DeTurk sold for about \$150,000. “I then concluded that the property owners on the lake, when you compare the lake and non-lake properties, were willing to pay on average \$50,000 more for having the lake frontage. This information indicated that without the lake all of the properties would be the same without lake access or without lake view and could result in the loss of approximately \$1 million, or \$50,000 x 20 properties.”

Cobb stated that his analysis included only data from the sale of 20 Shireman Estate properties, even though there are more lake properties that were not included. The information obtained from the other properties, 204 non-lake frontage properties within Shireman Estates, it was easy to conclude that you had approximately \$30 million worth of value in all of the values of properties that have sold and properties that have been listed. He then concluded that a reasonable indication in loss in value as the result of losing the lake and other common area properties could result in a 10% reduction in property values. From this information it was easy to ascertain that it would be about a \$3 million loss. This compared to the \$1 million loss would indicate a potential loss in property values of \$4 million.” Cobb said he then reviewed the assessed properties within Shireman Estates to ascertain the number of properties within the residential development and to ascertain the potential drop in property values that could result in a tax loss for the community and the City of Martinsville if, in fact, the assessed value of those properties dropped. “Since assessments have been tied directly to the market value of properties, in all likelihood, the affects from any loss of the lake and/or common area would result in also a loss in property values...The improvements made to both the common areas and the lake proper would undoubtedly contribute to the desirability of the neighborhood and could very definitely add value to the property.”

Ross O. Holloway, President of Holloway Engineering and Surveying located in Mooresville, Indiana, stated that he has been an Indiana Registered Land Surveyor for 25 years, and an Indiana Registered Professional Engineer for 16 years. Holloway is the Engineer for the City of Martinsville, and has been employed in that position for the past 16 years. Holloway Engineering and Surveying is a member of the American Association of State Dam Safety Officials, and conducts dam safety inspections annually and has reconstructed several dams, such as Wildwood Shores, Lake Hart, and two or three other dams in the area.

Holloway noted that the proposed conservancy district boundary map, Petitioners’ Exhibit 3, does not contain a legal description for a meets and bounds surveyed line of the dam and area around the toe of the dam. “As soon as that line has been agreed to by Ozark and the Petitioners then we can determine what that line is on the ground and write a legal description, which would encompass the entirety of the proposed conservancy district.” Holloway said that he has compiled information regarding costs to dredge Lake DeTurk and to rehabilitate some of the recreational facilities. He said of major concern was the dam and principal spillway. Holloway estimated the annual cost for maintaining Lake DeTurk, the dam, and spillway to be \$20,000, not including administrative costs, but strictly for maintenance paid directly to contractors performing work. He explained that in general the annual maintenance would include chemical

treatment of Lake DeTurk to reduce the proliferation of aquatic plant life (cattails), cutting grass and mowing the area of the dam and some inspections.

Holloway said that in 2007 he was directed, through the class action lawsuit, to review and inspect the Lake DeTurk dam. “Really to do an adequate job we would need to do some video camera work and other studies.” He said the principal spillway “does have some issues. There is some seepage coming about midway up the slope. We can’t determine whether that’s just an isolated incident from a valve that is there or whether it’s actually an issue with the principal spillway structure itself. The discharge structure at the toe of the dam has seriously deteriorated and needs some maintenance. If, in fact, the seepage was to the point that the dam would have to be breached and the principal spillway removed and reconstructed, you could easily be talking about approximately \$400,000 for costs.”

Holloway noted that siltation of Lake DeTurk has occurred in the upper reaches of the lake, the area of the ravines predominantly in the western portion of the lake. He said that sediment settles out of the water relatively quickly so the portion of Lake DeTurk, adjacent to the dam probably does not have much siltation. “But we estimated that in the western portions of the lake those areas would require approximately five acres of silt removal. If you go to an average depth of ten feet, you are talking 90,000 cubic yards and a cost as much as \$900,000.”

Holloway provided an estimate for maintenance of amenities—playgrounds, amenities on Lake Deturk (dock, and beach), and access site for boat and trailer. He said the tennis courts are “beyond and they need to be removed and replaced if the conservancy district so desired.” Holloway estimated that playground improvements and recreation improvements around the beach area, installing a new dock, would cost approximately \$150,000. “Playground equipment is extremely expensive now because of some of the liability issues. For instance, the City of Martinsville, just for one small playground is looking at \$75,000 to \$100,000.” He estimated that total improvement costs, not including the \$20,000 annual maintenance costs, would be \$1,450,000 to approximately \$1,500,000.

The Hearing Officer asked Holloway to further explain the causes of the water level fluctuations of Lake DeTurk.

Holloway stated that siltation of a lake “really has no impact on the normal pool elevation, because what it does it just takes away from the area of the lake not necessarily the normal pool elevation.” He said that Martinsville experienced an unusually dry summer this past year, but noted that there are two major incidences that can impact the level of Lake DeTurk other than rain events: (1) drawdown of water by Ozark Fisheries for its ponds; and (2) seepage and leaks in the Lake DeTurk dam. “I don’t believe they’re of a critical nature, but there is one leak as I mentioned earlier about halfway up around what appears to be a drawdown pipe of some kind. How extensive that leak is I don’t know. Another issue that is sort of unresolved is that right at the toe of the dam there is a series of ponds that Ozark Fisheries uses for its business. And that makes the toe of the dam constantly in a state of being saturated. Since it is saturated, there is almost no way for us to know until the ponds are drained and dried out of how extensive any seepage might be. That could be contributing to a drop in pool elevation.” Holloway stated that

the drainage basin that contributes to Lake DeTurk is relatively small for a lake of this size. “So any kind of drawdown or water taken from the lake does have quite a predominant affect on the normal pool elevation.”

Holloway stated that silt removal in the northwest portion of Lake DeTurk would improve the area of what has been described as a “mudflat” and would improve the aquatic quality of the lake, and increase the volume of the lake. So that as water is drawn down, since you have more storage volume, the level would drop less.” He said there are no silt reduction measures currently in place, and recommended silt traps be placed by the conservancy district. “It’s always easier to trap the silt before it gets to the lake in an area that it is easily and readily removable.” Holloway explained that silt removal from lakes is usually done by either of two methods: (1) draining the lake to the point where the area to be dredged dries out; or (2) hydraulic dredging. He noted that both methods are relatively expensive. He explained that his of \$900,000 for silt removal from Lake DeTurk assumes there is some place within the general vicinity of Lake DeTurk to place the dredged material. He also noted that here has been no silt removed from Lake DeTurk in the past 40 years or so since the construction of the dam. “I have lived here all my life. In fact, I helped do some odd staking, and to my knowledge Lake DeTurk has never had any kind of maintenance work at all other than maybe at the dam. If those things were to have been done through the course of years it would have prevented some of the siltation that has occurred and the cost to cure would have been a lot lower.”

Lawrence B. Cleveland, President of Ozark Fisheries, stated that he has been with Ozark for the past 16 years, but has been involved in fishery business for 20 years. He said Ozark is the owner of Lake DeTurk proper, the dam, and much of the real estate that lies below the dam where the fish ponds are located. Ozark’s primary business is the production of gold fish and coy. Ozark purchased Grassyfork Fisheries in 1970, and has continued the fishery operation adjacent to Shireman Estates. Cleveland said that as part of the Settlement Agreement Ozark would be obligated to convey to the conservancy district real estate within Shireman Estates where recreational amenities are located, Lake DeTurk, and the dam so long as the conservancy district is established.

Cleveland said that through the Settlement Agreement and under the terms of the Water Lease Contract Ozark would have a right for use of water within Lake DeTurk. He said Ozark “very much supports the petition, because it’s a fair settlement. You have heard that there has been a lot of disagreement and a lack of maintenance in Shireman Estates”. Cleveland stated that Ozark has not benefitted by maintaining the common areas, Lake DeTurk, and “particularly maintaining the dam—the mowing, the trimming, the repairs, just the replacement of the items in the parks, obviously the tennis court, none of that is consistent with our business. Quite frankly, we can’t justify the ongoing expense of that. We’ve been doing that for the last 41 years and the expense has been enormous. If the conservancy district is not established, and the maintenance of those amenities, the lake and dam, would not be cared for in the future as long as Ozark owns them. I can’t imagine that it would be any better than it is right now. I would suggest that it would continue to deteriorate and there would be an ongoing frustration between the owners of the lots and owners of Ozark Fisheries.”

Cleveland said he agreed that the use and benefit of Lake DeTurk as a recreational amenity for the residents of Shireman Estates is of greater value than it is to Ozark and its business purposes. He stated that if the State of Indiana required Ozark to make significant repairs to Lake DeTurk and the dam "I don't know how we would be able to pay for them. The flood of 2008 just about put us out of business. The economy being what it is, quite frankly, there would be no way we could afford to pay those kinds of expense repair numbers that Mr. Holloway mentioned earlier". Cleveland concluded by stating that presently Ozark is the owner of Lake DeTurk, the dam, the spillway, and areas within Shireman Estates, do not have the legal right to use Lake DeTurk. "In the future, if Ozark sold, either sold the real estate or sold its business, certainly the lake and dam would no longer be under Ozark's control."

Comments Received

State Representative Ralph Foley stated that he is a resident of Shireman Estates; raised his family there; and has enjoyed the amenities within Shireman Estates. Rep. Foley reflected that he was saddened by the deterioration of Lake DeTurk and amenities. "I feel strongly that there is a loss of common value. I do not live on the lake; I live several blocks from the lake. I certainly recognize the common selling point of Shireman as a place with those amenities." Rep. Foley compared the amenities existing in the 1970 to their current condition and usage. "The fishery owners used to provide for security. The lake is not within the city limits, but the lots are so that the developer provided security so there were no non-residential users. We used to be able to picnic down at the beach; enjoy the dock and the sand; and it was a lovely; and canoe; just a lovely environment. The playgrounds were active and continually used. The deterioration of those facilities and the lack of security that Mr. Keller suggested have been items of great concern to the residents, the non residential use, trash, debris, and perhaps other things that we don't find conducive to having picnics or recreational value to the development. Through the years, it has detracted, I think, from the value of living in Shireman." Rep. Foley stated that the amenities provide value and have tangible results and marketability. "Originally, I had, through the years, time and time again, neighbors or residents asking me what we can do. I had one particular extremely persistent person knocking on my door so that is how this originally came about."

Mary Krutulis said that she has lived in Shireman Estates for 35 years, but had owned property in the development prior to residing in Shireman Estates. She said her property has lake frontage. "We raised three kids there who swam, fished, boated, and did all the wonderful things that three young boys would enjoy. We now have six grandchildren that cannot enjoy the lake, because it is absolutely unusable. It's a disgrace. The weeds come to the surface of the water. We put sand beaches in down there on our own property and have installed a dock, had a sailboat, a rowboat." Krutulis noted that initially the residents were required to have a boat tag and a resident pin in order to recreate on Lake DeTurk and use the other amenities. She said the development was patrolled and was a safe place for everyone. Krutulis indicated that Lake DeTurk "has become trashy. We clean up the dam area every day. The residents really do care, at least the ones I know. It has been a terrible let down; we can't use anything; it's a mess; it's a disgrace. When I look at the original covenants, which I still have from the development, I see all of the things that they committed to do. All those things keeping it clean, maintaining the

common areas, which haven't been done for a long, long, long time. It is really is disturbing. I support this conservancy district to the fullest".

Joseph Krutulis, freeholder, stated that he seconded Mary Krutulis's statements. "Our oldest son used to tie flies all winter and then he had an inner tube with a seat tied in it, and he would fly fish all around that lake. He could tell you what fish would bite, where and when; that's how he spent his summers." Krutulis stated that in the late 1970s early 1980s, Lake DeTurk was pristine. "I used to play tennis on those courts. We couldn't wait for Grassyfork to put up the nets and play when the weather was nice. I played almost every evening with my boys. I would sail my sailboat. We used to be able to go all the way up to the other end of the lake. It was a glorious place 20 years ago, and then it just went downhill. I would like to see it that way again."

Jim Bishop, freeholder, stated that he currently lives in Shireman Estates in the second house he built in the residential development. "When we first moved out there our kids spent hours up at the lake swimming. The lake was clean, and pristine, and full of life. Now there are geese; it's just a filthy lake. I would like to see it put back the way it was." Bishop questioned the reasoning behind the conservancy district decision to allow Ozark to withdraw water from Lake DeTurk when Ozark has stated that it "does not need the lake for its business."

Jean Ambrose, stated that her husband, Robert, and she have lived and have been homeowner's in Shireman Estate for 32 years. We live on Midnight Road, which is the same road as the tennis courts are located. When we first moved there we played tennis on the beautiful tennis courts. They were secured. There was a gate with a lock on it. We had a key to get in there. The residents used that, and we very proud to move out to a location that had such amenities. We used to take friends to the beach...because it was a beautiful area. We've spent thousands of dollars in maintenance on our home while we've watched the area continue to deteriorate. We are in favor of the conservancy district.

Keith Schuman, freeholder, stated that he moved to Shireman Estates from Indianapolis in 1988, and has lived in the development for 23 years. "One of the reasons that we ended up moving here was because we had wanted to find lakefront property. ...One of the other appeals was that here was a place that was very natural, where you could feel like you were in a very natural setting, wildlife, and just the beauty of the water and the trees, but you were still within five minutes of a hospital and store and everything else." Schuman noted that he was an angler, which was another reason to relocate to Shireman Estates. "When I first moved to Shireman, fishing was fun and easy, and I would go out in the summers specially almost every night after work. My neighbor and I had many hours of fun and after dark fishing." Schuman said his residence is located at the western end of the Lake DeTurk, and said that over the years Lake DeTurk has gradually become much more difficult to access from his property. "Weeds have grown up, and silt has filled in. Our grandchildren and children that visit us used to be able to swim off our property or fish and catch nice fish. That is no longer possible. My nine year old granddaughter from Hawaii came to visit us this summer, and I was looking forward to treating her to some Midwestern fishing...and we could not find a place along our property line where you could really get a line in the water without weeds bothering you. We drove around to the dam area and even there we could not fish because of the weeds. My granddaughter ended up

with the case of the chiggers and one little fish. That is so different from the way it was when we first moved here.”

Roger Radue stated that he has lived in Shireman estates for 33 years, and raised his family there. Radue said he and his family spent a lot of time recreating on Lake DeTurk in the late 1970s to the middle 1980s. We could pretty much rely, if it wasn't annually, maybe every second year, Ozark would bring loads of sand in to maintain the beach. As everyone said, you could sail and kayak in the lake, and fish. I can remember that the end of the lake over by the Kartulises, you wouldn't have to go very far off shore and it was at least ten feet deep and now it is not. Both my sons and I played a lot of tennis down at the tennis courts. We used the baseball diamonds when my kids were in little league. Pretty much all that stuff has gone to rack and ruin.” Radue said that some residents made efforts to maintain the tennis courts for a few years, but then “it got completely out of control. Now I have grandchildren and I would dearly love to have them come home and to be able to use some of those same facilities that we used. We won't be able to do that unless we do something. So, I would certainly be in favor of the conservancy district.”

II. WRITTEN COMMENTS RECEIVED DURING AND AFTER THE PUBLIC HEARING

Attorney Peter Foley offered, and the Commission admitted into evidence, the following two letters:

Petitioners' Exhibit 5 (Letter from Joseph W. Krutulis and Mary E. Krutulis)

As original freeholders and thirty-five residents of Shireman Estates, Martinsville, Morgan County, Indiana, we were privileged to raise our family in the era when Missind Development/Grassyfork Fisheries honored the covenants into which they entered concerning this subdivision. The public areas, including playgrounds, shared beach areas, dam and tennis courts were well-maintained and used by the residents. Tennis court keys, resident badges, and boat decals were issued, and the area was patrolled to ensure continued security. Lake DeTurk was treated every year to keep it a safe and pleasant venue for bathing and fishing, and the amount of water that was drawn off for the fishery's use was limited and reasonable. In short, all was as had been originally promised.

But the fisheries changed hands, and deterioration began. The playgrounds are a disgrace, tennis courts unusable, beaches ungroomed and Lake DeTurk is a morass of muck and weeds, sometimes drawn down so far that the north end of the lake becomes nothing but mud flats. We are fortunate to own waterfront property, but our grandchildren, unlike our children, were not fortunate enough to be able to enjoy that property. The current condition of this potentially lovely body of water is shameful and saddening!

For the reasons above, and in the hope of restoring our lake and area to its former usable and enjoyable condition, we firmly support the formation of the Lake DeTurk Conservancy District. Our grandchildren are grown and off to college, but we would like all people, current and future, living in Shireman Estates (and perhaps our own great-grandchildren) to have the opportunity to enjoy what was promised to owners and reneged upon by the current fishery management. We hope the Conservancy District will be approved and implemented in the very near future.

Petitioners' Exhibit 6 (Letter from David McSwane, dated September 23, 2011)

I'm writing to express my undivided support for the creation of a conservancy district for Shireman Estates. I have owned property in Shireman Estates since the early 1970s and have occupied three homes at three different locations in the development since that time. I currently live at 30 Elliot Court and have lived there since 1993.

I support the creation of the Conservancy District for many reasons. At the time I purchased my first lot in Shireman Estates, the developer promised an exclusive community with a private lake and beaches and many other amenities such as tennis courts, playgrounds and private security. The company also promised it would be responsible for the maintenance and upkeep of the common properties and facilities which would eliminate the need for a homeowners association. Having heard horror stories about dealing with the vested interests of homeowner association boards of directors, such as the one in Foxcliff Estates, I chose to buy a lot and build a home in Shireman Estates.

For several years the development company maintained facilities and security for the neighborhood as promised. However, once all of the buildable lots in the area were sold, the developer's efforts began to wane. Most recently, maintenance efforts have diminished to simply mowing playground areas. Runoff from the surrounding watershed has caused Lake DeTurk to become filled with sediment. The beaches have been neglected and one beach has been essentially replaced by a grassy lot. The tennis courts have become unplayable and an eyesore. Much of the playground equipment in the main park area has been removed, and what remains has been allowed to deteriorate. The basketball practice area is also in need of repair. As a result of Ozark's failure to keep the promises contained in their original marketing materials, the quality of life in Shireman Estates has diminished and property values have dropped.

None of the three homes I have owned in Shireman Estates has been located on Lake DeTurk. However, I understand the importance of the lake and the other common properties for improving quality of life and property values in the neighborhood. I believe the creation of a conservancy district is the only viable way we have to stop the deterioration that has occurred in the neighborhood over the past decade or more. It is my belief that if the conservancy district is not formed, the deterioration will only get worse and at a faster rate.

While work responsibilities prevent me from attending the hearing before the Natural Resources Commission, I do want the members to know that I believe creating the conservancy district is vital to the future of Shireman Estates.

The period in which to file comments remained open through October 10, 2011. The following comments were submitted after the public hearing.

Dean Roberson (emailed September 29, 2011)

I was unable to attend the initial DNR hearing for the formation of the Lake De Turk Conservancy District held this past Monday, September 26th. With that in mind I wanted to send this email voicing my support for the formation of the CD since I have been very engaged in the process for much of the last year. I believe the success of this effort is critical to the long term health of Shireman Estates as it relates to the lake and its fauna (which includes the State endangered Kirtland's snake, existence confirmed by DNR Herpetologist Angela Garcia in the fall of 2008), the quality of life for the residents and to the long term protection of property values. I think it would also be a reasonably

accurate statement to say the formation of the district also benefits the town of Martinsville being that Shireman Estates sits within the City's borders.

Pam Guinn (emailed October 5, 2011)

I, Pam Guinn and husband Larry Guinn, residents of Shireman Estates, 220 Grassyfork Ln, Martinsville are very much in favor of a Conservancy District in our subdivision. We are hoping that as a conservancy district, there will be rules and regulations set up to protect our neighborhood from intruders on our rights as homeowners. We want the Deturk Lake to be protected, maintained, and governed so that we may be proud of it as many of the homeowners would like to use the lake for fishing, swimming, as a focal point and a drawing card for future homeowners to want to live here. Also, we want our playgrounds to be brought up to date and kept up for our children and grandchildren to enjoy. We have spoken to residents of properties elsewhere that now have Conservancy District jurisdiction and they have been pleased. It is our hope that this will be the outcome here in Shireman Estates as well. Thank you for your consideration in this manner.

Anna Radue (emailed October 9, 2011)

I am writing this letter on behalf of my husband and myself in support of the efforts to create the Lake DeTurk Conservancy District.

My husband and I have lived in Shireman Estates for 33 years at our Goodnight Road home. When our children were young we were able to use the lake's beach and park areas frequently in the summer. My husband and I played tennis on the Goodnight Road tennis court and frequently took our children to the park to use the swings and slide. Over the years all of these common areas have deteriorated and now need significant repair and updates. I direct visitors to our home using an indirect route so they do not drive past the dilapidated tennis court. I would not consider taking my grandchildren to the lake's beach or the Byram Boulevard Park as I did their parents.

We strongly support the creation of a Lake DeTurk Conservancy District to help restore the lake and provide an organizational structure to improve the area's amenities. We are optimistic the Conservancy District will increase the property values and improve the quality of life in Shireman Estates.

III. GOVERNMENTAL COMMENTS: STATE AND COUNTY

Indiana Department of Environmental Management

Lynne Newlon, Senior Environmental Manager, Office of Water Quality/Surface Water, Operations and Enforcement reviewed the Petition at the request of Debbie Dubenetzky, Branch Chief, Office of Water Quality/Compliance. On October 4, 2011 Newlon commented by email as follows:

I received your request to review the Petition for the Lake DeTurk Conservancy District located in Morgan County. Review of the proposed Conservancy District does not overlap with any Regional Districts. It appears it is in the city limits of Martinsville. Therefore, I do not see any conflict.

Indiana Department of Natural Resources

On October 12, 2011, Michael W. Neyer, Director of the Department of Natural Resources, Division of Water, filed the following:



**Division of Water
Memorandum**

Date: October 12, 2011

To: Jennifer Kane, Paralegal
Division of Hearings, Natural Resources Commission

From: Michael W. Neyer, P.E.
Director, Division of Water

RE: Establishment of the Lake DeTurk Conservancy District

On June 16, 2011, the petition for the establishment of the Lake DeTurk Conservancy District was filed in Morgan Circuit Court. Under Cause Number 55C01-1106-MI-1254, this petition was deemed complete as to form and content and referred to the Natural Resources Commission on August 12, 2011. The petition was forwarded to the Division of Water for review and comment.

The proposed Lake DeTurk Conservancy District is located on the Martinsville Quadrangle Map, Sections 27 and 34 of Township 12 North, Range 1 East. Documents on file with the Division of Water indicate that this low hazard dam was constructed by Grassyfork Fisheries Co., Inc. in the early 1970's to supply water for a goldfish hatchery. At some point the ownership of this commercial fish operation was transferred to Ozark Fisheries, Inc.

According to IC 14-33-2-2, the petition must be signed by 30 % of the freeholders owning land in the proposed district. The proposed Lake DeTurk Conservancy District includes 248 freeholders with 124 of those signing the petition. The petition requests that the district be established for the purposes of: 1) developing forests, wildlife areas, parks, and recreational facilities if feasible in connection with beneficial water management, and 2) operation, maintenance, and improvement of works of improvement.

As directed by Chapter 2, Section 17 of the Indiana Conservancy Act (IC 14-33), and pursuant to the Public Hearing on September 26, 2011, concerning the proposed establishment of the Lake DeTurk Conservancy District in Morgan County, the Division of Water offers the following comments.

1) Appears to be necessary

- a. Developing forests, wildlife areas, parks, and recreational facilities if feasible in connection with beneficial water management:**

Lake DeTurk supplies water to a fish hatchery owned by Ozark Fisheries. The dam is classified as low hazard according to accepted dam safety standards. The original structure was relatively small but the addition of 20 feet of material in the 1970's increased the total height of the dam to 30 feet. As indicated in dam inspection reports this work was initiated without the necessary permits from the Department of Natural Resources (DNR). On April 11, 1979, an application for Approval of Construction in a Floodway was submitted but DNR staff determined that additional soil information would be needed before the evaluation could be completed. The permit (D-6132) was issued by the DNR on August 30, 1985.

Shireman Estates is a 322 lot residential development that is now part of the City of Martinsville in Morgan County. This development contains the 35 acre Lake DeTurk, dam and spillway, two (2) beaches, two (2) parks and common areas which were improved and maintained by the original developers of Shireman Estates and are now owned by Ozark Fisheries (Ozark).

In 2000, a group of real estate owners in Shireman Estates filed a lawsuit against Ozark Fisheries because they felt they had a right to use and enjoy Lake DeTurk and the other amenities provided by the original developer and that Ozark had a duty to maintain Lake DeTurk and those amenities. A Settlement Agreement between the parties was reached in November 2010.

This Agreement stipulates that within 90 days of the approval of the Agreement by the Court, the Plaintiffs are to file a petition for the formation of a conservancy district. It is the intention of the proposed conservancy district to manage, operate and conserve the water resource known as Lake DeTurk. Specifically the Conservancy District will accept any and all liabilities concerning the real estate conveyed by Ozark, including but not limited to taxes, insurance, maintenance, and improvements. Ozark will be provided with a perpetual right to withdraw a reasonable amount of water from Lake DeTurk for use in its commercial fish operation. Terms of Use will be established in a Water Lease to be executed between Ozark and the Lake DeTurk Conservancy District.

Several long time residents of Shireman Estates stated at the September 26, 2011 public hearing that they purchased their property because of the lake and the associated recreational facilities. Use of the lake for canoeing and fishing was a common occurrence. Amenities such as the picnic area, beach, playground, and sports facilities were also significant attractions for the residents. However these facilities have not been maintained and are now in a state of disrepair. It is the intent of the proposed conservancy district to restore the recreational facilities. Potential projects outlined at the public hearing may include controlling weeds in the lake, addressing siltation, and rehabilitation of the beaches, playground, picnic area, and sports facilities.

The dilapidated recreational facilities (baseball field, tennis court, basketball court) in Shireman Estates would not ordinarily be considered "in connection with beneficial water management" as stated in the statute. However there are other instances where conservancy districts have this purpose which allows them maintain areas such as a community center, play ground and a swimming pool. It was noted in the reports prepared by DNR that conservancy districts with these amenities would unify the community and provide an aesthetically pleasing living environment.

This purpose appears necessary.

b. Operation, maintenance and improvement of a work of improvement for water based recreational purposes:

Appropriate maintenance is an integral part of responsible dam ownership. Currently the lake, dam and several lots in the Shireman Estates are owned by the Ozark Fisheries. In 2000, a lawsuit was filed against Ozark by a group of Shireman Estates property owners because they felt Ozark had a

duty to continue to maintain the amenities provided by the original developer. A Settlement Agreement was reached between the two (2) parties in November 2010.

Upon acceptance by the Morgan Circuit Court of the Settlement Agreement, Ozark shall convey the dam, Lake DeTurk, and certain lots of Shireman Estates to Lake DeTurk Conservancy District. Additionally Ozark will be relieved of any and all future obligations to maintain, improve or service any of the common areas, parks, lakes any property conveyed or any property located within the platted area known as Shireman Estates. Ozark Fisheries placed \$35,000 into escrow which will be distributed to the Lake DeTurk Conservancy District upon successful establishment.

Several residents, who attended the September 26, 2011 public hearing, indicated that they originally purchased their property because of the proximity to Lake DeTurk and the recreational opportunities it offered. The President of Ozark Fisheries indicated at the same hearing that it was not in the best business interest of the company to maintain the recreational facilities into perpetuity. This lack of maintenance has caused the lake to be difficult to use for fishing and canoeing. The other facilities such as the picnic area, beaches, sports facilities, and playground are also in a state of disrepair.

Once established the Lake DeTurk Conservancy District will be responsible for the real estate conveyed to them by Ozark. This will include but not be limited to taxes, insurance, maintenance, and improvements to the conveyed property except obligations specifically assumed by Ozark in the Water Lease Contract.

The formation of the Lake DeTurk Conservancy District for the purpose of operation, maintenance and improvement of a work of improvement appears to be necessary.

2) Holds promise of economic and engineering feasibility

Shireman Estates is a 322 lot residential development that also contains the 35 acre Lake DeTurk, a low hazard dam, two (2) beaches, two (2) parks and other common areas which are now owned by Ozark Fisheries. Several property owners in Shireman Estates filed a lawsuit in 2000 because they felt that Ozark had failed to maintain Lake DeTurk and the other recreational facilities. A Settlement Agreement accepted in 2010 outlines how the lake, dam, and common areas will be conveyed to the proposed Lake DeTurk Conservancy District.

An informational meeting for all of the residents of Shireman Estates was held on May 10, 2011. This meeting provided details on what a conservancy district entails, potential annual budget, and estimated costs to freeholders.

Several residents who have lived in Shireman Estates for over 20 years spoke at the September 26, 2011 public hearing in support of the conservancy district. The common theme was that Lake DeTurk and its recreational opportunities is what attracted them to purchase their homes in Shireman Estates. The lack of maintenance has caused these areas to fall into a state of disrepair and some are not useable. These residents felt that it was time for them to create an entity that would own and maintain the lake, dam and common areas for the good of the entire community.

Appraiser and real estate broker, Steve Cobb, provided testimony that property with lake frontage typically sells for \$200,000 but if the lake no longer existed, each of those 20 lots could experience a loss in value of \$50,000 for a total reduction of \$1M. Likewise properties not on the lake would probably experience a 10% potential loss in value if the lake and recreational opportunities no longer existed. Establishment of a conservancy district will provide a mechanism for the property owners in

Shireman Estates to have ownership of the lake, dam, and common areas as well as provide for its rehabilitation and maintenance into the future.

A letter of support from the Morgan County Board of Commissioners was filed with the Natural Resources Commission on September 28, 2011. The Commissioners indicated that a conservancy district will provide those who benefit from the lake the means and authority to maintain the lake, dam, and any improvements for the years to come.

It is anticipated that the creation of a conservancy district for maintenance, repair, and operation of the works of improvement will have a positive effect on property values while providing recreational opportunities to the freeholders of the proposed District. The petition indicates that costs will most likely be paid for by the annual levy of special benefits taxes and an annual assessment on land to be exceptionally benefited. Annual operation and maintenance costs are estimated to be \$47,300.

The Lake DeTurk Conservancy District shall establish a Cumulative Maintenance Fund as set forth in the Indiana Conservancy Act, IC 14-33-14.

It appears that the proposed Lake DeTurk Conservancy District holds promise of economic and engineering feasibility.

3) Seems to offer benefits in excess of costs

Ozark Fisheries currently owns Lake DeTurk, the dam, spillway, and ten (10) lots utilized for recreation in Shireman Estates. Upon acceptance of the Settlement Agreement by the Court, Ozark is to execute Warranty Deeds conveying the real estate; the deeds are to be held in escrow, pending formation of the Conservancy District.

The proposed District will collect and manage funds to address any repairs and provide for long-term maintenance of the Lake DeTurk Dam, beaches, and parks.

At the September 26, 2011 public hearing, Steve Cobb an appraiser and real estate broker provided testimony regarding the loss of value that would result if Lake DeTurk was eliminated. After review of the listings and calculating the averages, the 20 homes on the lake sold for approximately \$200,000 while the average home not on the lake sold for \$150,000. If Lake DeTurk no longer existed, each lake front home could experience a potential loss of \$50,000 or a total reduction of \$1M for the community. Mr. Cobb also indicated that those lots not on the lake would likely experience a 10% loss in value from the lack of recreational opportunities. The potential losses of \$4.5M for the non-lake properties and \$1M for lake front properties would reflect in a total loss of property values of \$5.5M for Shireman Estates. Improvements and maintenance to the lake and common area would have a positive effect on the property values and increase the desirability of purchasing a home in Shireman Estates.

Ross Holloway of Holloway Engineering & Surveying testified at the public hearing that general maintenance of the lake and dam would cost approximately \$20,000 annually. Inspections have noted a seepage problem on the principal spillway which could be attributed to a problem with a valve or may indicate another problem with the dam. If the dam should need to be breached because of problems those costs could be in the range of \$400,000.

Mr. Holloway indicated that rehabilitation of the several of the recreational facilities could cost approximately \$150,000. Siltation along the western side of the lake was also mentioned as a problem. Removal of the silt would improve the quality of the lake and benefit the recreational activities. The amount of silt to be removed, method of removal, and location of a disposal site could cost as much as \$900,000 and make this project too costly in the short term. Therefore the siltation issue may need to be addressed in phases or considered a future project.

The benefits should exceed the costs associated with maintaining this dam and rehabilitating the other recreational facilities by continuing to provide recreational opportunities to the freeholders of the District while maintaining property values associated with the lake.

4) Proposes to cover and serve a proper area

Chapter 3 of the Indiana Conservancy Act states that "any area may be established as a district if each part of the district is contiguous to another part". The boundaries of the proposed Lake DeTurk Conservancy District are contiguous.

The proposed boundaries encompass Shireman Estates which is a residential subdivision in Sections 27 and 34 of Township 12 North, and Range 1 East. Included within Shireman Estates is the 35-acre Lake DeTurk. The conservancy district will include only the property owners of Shireman Estates, who will benefit from the establishment of the District.

As proposed the Lake DeTurk Conservancy District boundaries appear to cover and serve a proper area.

5) Could be established and operated in a manner compatible with established Conservancy Districts, flood control projects, reservoirs, lakes, drains, levees, and other water management or water supply projects

There are no other Conservancy Districts whose boundaries would overlap those of the proposed Conservancy District. The Lake Edgewood Conservancy District is also located in Morgan County but it is northwest of Martinsville whereas Lake DeTurk is on the northeast side of Martinsville. The proposed Lake DeTurk Conservancy District could be established and operated in a manner compatible with other districts. The proposed district does not appear to interfere with any other known flood control or water management areas.

Should you have questions concerning the above comments, please contact Terri Curlee Price, Project Development Section at 317-234-1081.

MWN/TCP

Morgan County Board of Commissioners

On September 28, 2011, the Morgan County Board of Commissioners submitted the following:



Morgan County Board of Commissioners
180 S. Main Street Suite 112
Martinsville, IN 46151
www.MorganCounty.in.gov

September 19, 2011

Indiana Department of Natural Resources
402 W Washington Street
Indianapolis, IN 46204

FILED

SEP 28 2011

NATURAL RESOURCES COMMISSION
DIVISION OF HEARINGS

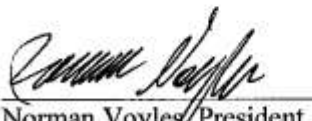
RE: Lake DeTurk Conservancy District

To Whom It May Concern:

The Board of Commissioners of Morgan County support the formation of the Lake DeTurk Conservancy District.

The District provides a means of the residents of the Shireman Estates subdivision to control and maintain Lake DeTurk and the dam. Although many portions of the proposed District are located within the City of Martinsville, Lake DeTurk, the dam, and the area immediately below the dam, are all located within the County. A conservancy district provides those who benefit from the lake the means and authority to maintain the lake and the dam and any improvements that may be necessary in the years to come.

Sincerely,


Norman Voyles, President
Morgan County Board of
Commissioners


Brian Goss
Commissioner


Don Adams
Commissioner

III. PROPOSED FINDINGS

As the statutory responsibilities of the Commission are applied to the proposed Lake DeTurk Conservancy District, the Commission shall make a determination under Ind. Code § 14-33-2-17 and report to the Morgan Circuit Court whether the proposed district, for the two purposes meets the following conditions:

- (1) Whether the proposed district appears to be necessary;
- (2) Whether the proposed district holds promise of economic and engineering feasibility;
- (3) Whether the proposed district seems to offer benefits in excess of costs and damages;
- (4) Whether the proposed district proposes to cover and serve a proper area; and
- (5) Whether the proposed district could be established and operated in a manner compatible with established: (A) conservancy districts; (B) flood control projects; (C) reservoirs; (D) lakes; (E) drains; (F) levees; and (G) other water management or water supply projects.

Within this statutory structure, the following findings are recommended to the Morgan Circuit Court with respect to the Petition for the creation of the Lake DeTurk Conservancy District:

PURPOSE: Developing forests, wildlife areas, parks, and recreational facilities if feasible in connection with beneficial water management

The proposed district appears to be necessary

Ozark Fisheries, Inc., a Missouri for-profit corporation duly qualified to do business in the State of Indiana, owns real estate in Morgan County, Indiana, and operates a commercial fishery located in unincorporated Morgan County. In 1970, Ozark purchased Grassyfork Fisheries, a goldfish hatchery near Martinsville in Morgan County and founded in 1902 by Eugene Shireman. Ozark contracted with Missind Development Corporation, an Indiana real estate development company, to develop acreage adjacent to Lake DeTurk and located near its commercial fishery. The acreage was developed into a 322-lot residential community, Shireman Estates. Shireman Estates is within Martinsville's corporate city limits; however, Lake DeTurk, the dam, and areas adjacent to the lake—the toe of the dam, principal spillway, and emergency spillway—are not incorporated.

As part of the development of Shireman Estates, Missind represented that it would maintain Lake DeTurk, the associated dam and other appurtenances, the recreational amenities—tennis courts, basketball court, ball field, beach—for the benefit of the residents. Testimony was presented that Shireman Estates, at the outset, was marketed as a lake community offering additional recreational amenities, but without the maintenance obligation and without management through a homeowners association.⁴ This marketing approach was directed to enhance desirability of Shireman Estates over several competing residential developments with similar amenities. David McSwane, a freeholder within the proposed conservancy district, was

⁴ Statements of Petitioners' Attorney, Peter Foley, p. 4 of this report.

persuaded by Missind's marketing, and in the early 1970s purchased a lot within Shireman Estates to build a home.⁵

Shireman Estates features a 35-acre lake, Lake DeTurk, two beaches, and contains two parks (with basketball courts, tennis court and playground equipment), and common areas, which were all improved and maintained by the developers of Shireman Estates and are now owned and maintained by Ozark.⁶ Ozark testified that it has been maintaining Lake DeTurk, the dam, and other recreational amenities for 41 years; however, it can no longer justify the ongoing expense.⁷ Ozark suggests that Lake DeTurk, the dam, and the other recreational amenities will continue to deteriorate and the frustration between residents of Shireman Estates and Ozark would be ongoing.⁸

Ozark is to convey the dam, Lake DeTurk, and lots 95, 96, 97, 98, 172, 173, 337, 338, 346, and 351 to the established conservancy district.⁹ Currently, Shireman Estates does not have a management structure to maintain these facilities. If established, the Lake DeTurk Conservancy District would manage and maintain the Lake DeTurk, dam, ancillary structures, and the recreational parks. This approach would help protect the integrity of the water management infrastructure. Shireman Estates does not have the funding or expertise required to properly manage and maintain the Lake DeTurk dam for developing forests, wildlife areas, parks and recreational facilities in connection with beneficial water management. The proposed district appears to be necessary.

Whether the proposed district holds promise of economic and engineering feasibility

The proposed Lake DeTurk Conservancy District would benefit 248 freeholders within the proposed district and the surrounding community by appropriate dam maintenance. In November 2007, Holloway Engineering & Surveying ("Holloway Engineering") visually inspected the Lake DeTurk dam and found that:

In general the dam embankment, slopes, and crest are adequate. However, due to a total lack of maintenance over many years there are several areas of deficiency. Grass, weeds, and brush need to be cut in several areas particularly along the toe and waters edge of the dam and around the spillway. Animals have burrowed in to the embankment in several locations which need immediate attention. There is severe slope erosion near the north end of the dam on the lake side. Wet areas and seepage was found around the spillway pipe and around the drawdown valves.

There are two areas of deep concern: First is the deteriorated condition of the principal spillway, where the inlet and outlet concrete needs complete replacement and there is evidence of extensive seepage along the spillway pipe. Also, it appears that the drawdown pipes and valves have not been operated in many years and may not function. Second is the blockage of the auxiliary spillway. While I can understand the need for a smooth transition of the roadway across the

⁵ Petitioners' Exhibit 6, p. 14 of this report.

⁶ Petitioners' Exhibit 2, Settlement Agreement, p. 1.

⁷ Testimony of Cleveland, p. 10 of this report.

⁸ *Id.*

⁹ The lots listed in Petitioners' Exhibit 2 differ from the testimony given at the September 26, 2011 public hearing and as depicted in Petitioners' Exhibit 3 and Hearings' Exhibit A. The exhibits and testimony indicate that Ozark owns Shireman Estates Lots 96, 97, 98, 171, 172, 173, 337, 338, 346, and 351.

spillway it appears that the road blocks the spillway to such an extent that in a large precipitation event the spillway will not function and the dam could be overtopped.

It is recommended that immediate action be taken to reconstruct the principal spillway and replacement of the drawdown pipe and valves. The work will require a permit from IDNR. Also, an investigation needs to be made as to the adequacy of the auxiliary spillway as currently configured.

Petitioners' Exhibit 8, Lake DeTurk Dam Inspection Report, Cover Letter.

Minimum cost for rehabilitation of the principal spillway is estimated at \$200,000; however, if the spillway is required to be replaced, which may be likely due to the deteriorated condition of the discharge pipes and seepage, the cost could be as much as \$400,000.¹⁰ Holloway Engineering stated that in recent months the deficiencies listed in Petitioners' Exhibit 8, mainly excessive growth of weeds and brush on the dam slopes and animal burrows, have been addressed; however, Holloway Engineering recommended maintenance of the dam slopes must continue on a regular basis but not less than twice annually.¹¹ It is estimated that the annual cost for the recommended maintenance would be \$20,000 annually.¹²

Testimony was presented that Lake DeTurk has never been dredged nor has there been a program of sediment removal. Two areas of Lake DeTurk show the greatest impairment by sediment: a major arm that runs north; and a second smaller arm in the area of the beach both on the west end.¹³ Testimony provided described the west end of Lake DeTurk as a "mudflat".¹⁴ Holloway stated that silt removal in the northwest portion of Lake DeTurk would improve the area of what has been described as a mudflat and would improve the aquatic quality of the lake and increase the volume of the lake.¹⁵

Testimony by several freeholders described Lake DeTurk, as it existed in the 1970s and 1980s, as "pristine", "lovely", "glorious", "clean", and "full of life". Roberson, a freeholder, offered written testimony that in the fall of 2008, DNR confirmed the presence of the State endangered Kirtland's snake (*Clonophis kirtlandii*)¹⁶. Removal of the sediment to a depth that would provide ten feet of water would have three positive impacts: (1) aquatic habitat would improve; (2) recreation uses would improve; and (3) there would be a larger volume of water available for use offsite.¹⁷ It is estimated that 90,000 cubic yards of sediment would need to be removed from the west end of Lake DeTurk at a cost of \$900,000.¹⁸

In addition to Lake DeTurk proper, there are three areas for recreation within the boundaries of the proposed Lake DeTurk conservancy district: beach area, playground, and tennis and

¹⁰ Petitioners' Exhibit 9, p.2

¹¹ *Id.*, p. 1.

¹² Testimony of Holloway, p. 8 of this report.

¹³ Petitioners' Exhibit 9, p. 2.

¹⁴ Testimony of Keller, pp. 6, 7 of this report.

¹⁵ Testimony of Holloway, p. 10 of this report.

¹⁶ Kirtland's snake is listed in the Roster of Indiana Animals, Insects, and Plants that are Extirpated, Endangered, Threatened, or Rare (also described as Special Concern), Information Bulletin #2 (Fourth Amendment); posted in the Indiana Register at 20070815-IR-312070469NRA, p. 2.

¹⁷ Petitioners' Exhibit 9, p. 2.

¹⁸ Testimony of Holloway, p. 9 of this report.

basketball courts. The beach is in very poor condition and unsafe as is the playground equipment and the tennis court, and ball field have been neglected and are unusable.¹⁹ Testimony provided by the freeholders supports Holloway Engineering's description of the current condition of these recreational amenities. Holloway Engineering recommends that:

The tennis court is beyond repair and should be removed as should...the existing playground equipment has exceeded its useful life and does not meet modern standards. To re-establish the beach area, restore either the ball field or replace it with a multiuse field and provided a limited quantity of new playground equipment is estimated to cost \$150,000. Further the recreation areas will have to be mowed and maintained from May through October at an estimated cost of \$5,000. Petitioners' Exhibit 9, p. 3.

Dam improvements would help assure stability and integrity as well as helping to preserve the recreational values of Lake DeTurk. The maintenance responsibilities of Ozark would be shifted to the proposed Lake DeTurk Conservancy District, including dam improvement, maintenance, dam mowing, aquatic weed control, and sediment removal. The Department of Natural Resources, Division of Water (the "Department") found these responsibilities are "appropriate lake management activities to be continued by the proposed conservancy district."²⁰

A conservancy district is a special taxing district created for local public improvement. *Martin v. Ben Davis Conservancy Dist.*, 238 Ind. 502, 523, 153 N.E.2d 125, 135 (1958). "The Indiana Conservancy Act allows for `the creation of conservancy districts for the purpose of controlling stream pollution, drainage, irrigation, water supply and other natural resources. It creates a board of directors and permits the levying of a tax and assessment for the benefits and improvements to the real estate within the district.'" *Clear Creek Conservancy Dist. v. Kirkbride*, 743 N.E.2d 1116, 1117 (Ind.2001) (quoting *Martin*, 238 Ind. at 507, 153 N.E.2d at 128).

In re Petition for Establishment of the Millpond Conservancy District, 891 N.E.2d, 54, 55 (Ind.App. 2008)

The proposed Lake DeTurk Conservancy District may supplement its budget for the maintenance repair and operation of the works of improvements necessary for developing forests, wildlife, parks and recreational facilities in connection with beneficial water management through both annual levy of special benefit taxes and an annual assessment on land found to be exceptionally benefitted.

The proposed conservancy district as a quasi-governmental entity affords the mechanism for operation, maintenance, and improvements of the Lake DeTurk dam including funds management. The proposed district holds promise of economic and engineering feasibility for the purpose of developing recreational facilities in connection with beneficial water management.

¹⁹ Petitioners' Exhibit 9, pp. 2, 3.

²⁰ Natural Resources Commission report, *In re Petition for Creation of the Hants Lake Conservancy District*, 41C01-0312-MI-00018 (2004), p. 6.

Whether the proposed district seems to offer benefits in excess of costs and damages.

Dams are commonly used to provide recreational resources and can enhance property values, but they must be properly maintained to realize their potential.²¹ The Department has classified the Lake DeTurk dam as a “low hazard”²². A low hazard is a structure the failure of which may damage farm buildings, agricultural land, or local roads.²³ The failure of even small dams can result in serious injuries, fatalities, and extensive property damage. The dam owner loses a valuable asset and faces reconstruction costs and possible liability for downstream damages.²⁴

Lots within Shireman Estates with lake frontage sell for an average of \$200,000 and back lots, without lake frontage, selling for an average of \$150,000.²⁵

From this information it is reasonable to assume that the properties around the Lake [DeTurk] were listed for \$50,000 on the average more than those off water properties. Thus loss of Lake frontage could result in a reduction in properties values of \$1,000,000. Likewise those properties not having lake frontage would also be effected by the loss of the lake access play-ground area etc. It is reasonable to assume a 10% potential loss in value for a total of \$3,000,000, which reflects a total potential loss in property values of \$4,000,000.

Petitioners’ Exhibit 7, p. 1

The Morgan County Board of Commissioners supports the creation of the Lake DeTurk Conservancy district, because the district would provide those who benefit from the lake the means and authority to maintain the lake and the dam and any improvements that may be necessary.²⁶ Testimony was also presented that since assessments have been tied directly to the market value of properties a loss in property value could result in a tax loss for the City of Martinsville in loss of revenue.²⁷

The loss of Lake DeTurk would lead to decreased property values and decreased recreational opportunities. The benefits gained from developing recreational facilities in connection with beneficial water management in relation to costs and damages are partly intrinsic in nature and may be partly impossible to quantify. To summarize, there is a potential for \$4,000,000 loss of property value and recreational opportunity that may be incurred through the loss of Lake DeTurk, and the costs for improvements of the dam and recreational facilities are estimated at \$1,450,000 to \$1,500,000. The benefits of dam improvement and continued maintenance of the dam and other recreational amenities far exceeds all consequential costs of dam failure. The proposed district seems to offer benefits in excess of costs and damages.

²¹ Indiana Dam Safety Inspection Manual, 2007, § 1.1, Figure 1-1, p. 1-1; <http://www.in.gov/dnr/water/3593.htm>.

²² Department Memorandum, p. 17 of this document.

²³ Indiana Dam Safety Inspection Manual, § 1.6, p. 1-8.

²⁴ *Id.*, § 1.4.2, p. 1-5.

²⁵ Testimony of Cobb, p. 8 of this report.

²⁶ Morgan County Board of Commissioners, p. 21 of this report.

²⁷ Testimony of Cobb, p. 8 of this report.

Whether the proposed district proposes to cover and serve a proper area

The territory to be included in the Lake DeTurk Conservancy District will include Lake DeTurk, the dam, spillway, and appurtenances, all real property adjoining Lake DeTurk and all platted lots in Shireman Estates, a subdivision in the City of Martinsville.²⁸

Any area may be established as a district if each part of the district is contiguous to another part. The area within the proposed district boundaries, and as depicted in the proposed conservancy district boundary map, NRC-Hearings' Exhibit A, submitted by Petitioners and attached to this report, appears to be contiguous.

Whether the proposed district could be established and operated in a manner compatible with established: conservancy districts; flood control projects; reservoirs; lakes; drains; levees; and other water management or water supply projects

Evidence presented by the Petitioners as well as state agency comments filed during this proceeding establish there does not exist, near the proposed district boundaries, a water management or a water supply project with which the Lake DeTurk Conservancy District would interfere.

PURPOSE: Operation, maintenance, and improvement of a work of improvement for water based recreational purposes

The proposed district appears to be necessary

Shireman Estates is a 322-lot residential development located in the City of Martinsville, Morgan County, Indiana, and adjacent to Lake DeTurk. Lake DeTurk, the dam (Dam ID: 55-76) and spillways, and ten lots within Shireman Estates are owned by Ozark Fisheries, Inc. For the past 41 years, Ozark has carried the responsibility for maintenance of Lake DeTurk, the dam, principal and emergency spillways. Lake DeTurk dam

impounds approximately 36 acres of water and has a drainage area of approximately 384 acres. Length of the dam at the crest is 590 feet and a dam height of thirty feet and a crest width of 25 feet. There is approximately 9 feet between the crest and the normal pool of the lake.

Petitioners' Exhibit 8, Cover Letter

The Department of Natural Resources suggests visual dam inspections be performed and noted on a departmental form (Earth Dam Visual Inspection Report²⁹). It is important to note that the inspection report form has evolved over time; however, the form has been generally consistent regarding a section for overall rating of the condition of a dam. The inspection report lists overall condition ratings as "satisfactory"³⁰, "fair", "conditionally poor", "poor", and

²⁸ Petition, ¶4, p. 2.

²⁹ Indiana Dam Safety Inspection Manual, Appendix C.

³⁰ Inspection report forms in early 1990s used a highest rating of "good" with latter forms using "satisfactory", but it appears both terms are equivalent.

“unsatisfactory”. Lake DeTurk dam inspection reports in Petitioners’ Exhibit 8 performed on September 27, 1983 through December 10, 1987 indicate an overall conditions of the dam as “good”; inspection reports dated April 10, 1990 through July 31, 1998 indicate overall conditions as “fair”; and inspection reports dated December 13, 2001 through October 30, 2007 indicate overall conditions as “conditionally poor”. “Conditionally poor” means

a potential safety deficiency is recognized for unusual loading conditions which may realistically occur during the expected life of the structure. Conditionally poor may also be used when uncertainties exist as to critical analysis parameters which identify a potential dam safety deficiency; further investigations and studies are necessary.

Indiana Dam Safety Inspection Manual, Appendix C, IDNR Dam Inspection Report Form, p. 6.

Under Ozark’s management, Lake DeTurk, the dam, and spillways have continued to deteriorate. Ozark’s primary business is the production of gold fish and coy. Testimony was given that Ozark has not benefitted from maintaining the common areas within Shireman estates, Lake DeTurk, and particularly Lake DeTurk dam.³¹ Testimony was also provided that as long as Ozark owns Lake DeTurk, the dam and its appurtenances, these facilities would not be cared for in the future.³²

Testimony of freeholders within the proposed conservancy district supports the evidence that Lake DeTurk and the dam and it appurtenances have deteriorated since the 1970s. Because of the ongoing deterioration, a group of Shireman Estates residents (“Plaintiffs”) filed a class action law suit that alleges

...the Plaintiff Class has a right to use and enjoy Lake DeTurk and the other amenities provided by the original developer, that Ozark has a duty to maintain Lake DeTurk and the amenities for the benefit of the actions or omissions of Ozark regarding the care and condition of Lake DeTurk and the other amenities.

Petitioners’ Exhibit 2, Settlement Agreement, p. 1.

Ozark disputed the Plaintiffs’ allegations and asserted that the Plaintiffs have not been damaged by the actions or omissions of Ozark.³³ On November 29, 2010, the Plaintiffs and Ozark entered into a settlement agreement to resolve and settle all issues, and agreed and stipulated that

...1. Within 90 days of approval of this Settlement Agreement by the Court, the Plaintiff Class will file a petition in the Morgan Circuit Court for the formation of a conservancy district pursuant to I.C. 14-33. The prupose of the conservancy district (hereinafter, “District”) will be to manage, operate and conserve the water resource known as Lake DeTurk. Ozark will not be a member of the District and will not be subject to any levy or assessment of the District. Plaintiffs shall be responsible for and pay all costs associated with the formation of the conservancy district and the conveyance of the real estate described herein including all legal, title, survey and any other pre-closing and closing costs to complete transaction. Ozark shall have no responsibility to pay any cost related to the conveyance of the real estate described herein, unless otherwise set forth herein.

³¹ Testimony of Cleveland, p. 10 of this report.

³² *Id.*

³³ Petitioners’ Exhibit 2, p. 1.

2. Ozark shall convey the dam, Lake DeTurk, and lots 95, 96, 97, 98, 172, 173, 337, 338, 346, and 351 to the District in “as is” condition without warranties, excepting only warranties of title. Upon acceptance of the Settlement Agreement by the Court, Ozark shall execute Warranty Deeds conveying the real estate, which deeds shall be held in escrow, pending formation of the District.

3. Should Ozark change the land use below the dam so as to cause the dam to be reclassified as a “high hazard” (or equivalent) structure, requiring the dam and its appurtenances to be upgraded or reconstructed in order to be in regulatory compliance, Ozark shall provide the conservancy district prior notice.

4. Ozark shall provide the District with all necessary easements below the dam for drainage, overflow and discharge from the dam. Ozark shall retain an easement for the drainage, overflow and discharge and to maintain all systems necessary to withdraw water from Lake DeTurk.

5. Ozark shall be provided a perpetual right to withdraw a reasonable amount of water from Lake DeTurk for use in its commercial fish operation. The terms of use shall be set forth in a Water Lease Contract to be executed by and between Ozark and the District, which is attached hereto as Exhibit “A”. [not attached]

6. Ozark shall be relieved of any and all future obligations to maintain, improve or service any of the common areas, parks, lakes, any property conveyed or any property located within the platted area known as Shireman Estates. The District shall accept any and all future liabilities concerning the real estate conveyed to the District by Ozark, including but not limited to taxes, insurance, maintenance, improvements of the conveyed property, excepting only obligations specifically assumed by Ozark in the Water Lease Contract. The District will not assume any assessed, but unpaid taxes. ..

7. Ozark shall convey the property in “as is” condition where the Plaintiff Class has had the opportunity to inspect the dam and properties. The Plaintiff Class last inspected the dam in November, 2007 and shall have the opportunity to re-inspect the dam at its sole cost and expense. In the event the dam re-inspection reveals substantial defects, then the Plaintiff Class may, at its election and within five (5) days of receiving the inspection report, cancel this Agreement. Ozark shall be under no obligation to repair or cure any defects or issues revealed unless required to do so by the Indiana Department of Natural Resources. Ozark shall not be liable for any disclosed and known defects concerning the real property conveyed to the District. Ozark shall be responsible to repair or cure any items required by the Indiana Department of Natural Resources, up to the date of closing on the real estate conveyance. Prior to conveyance of the real estate, Ozark shall disclose to the Plaintiff Class the location of all pipes, valves or other mechanical operations associated with the dam and the supply of fresh water from Lake DeTurk to Ozark’s commercial fish operation.

8. Ozark and the Plaintiff Class shall execute mutual releases with respect to any and all past and future legal liabilities that the parties may have or claim against one another concerning Shireman Estates and Lake DeTurk. The releases shall include Ozark, its predecessor corporation, officers, directors and stockholders.

9. Ozark shall pay the District the sum of \$35,000. Ozark shall pay the \$35,000 into escrow upon the acceptance of the Settlement Agreement. The escrow will be distributed upon the successful formation of the District. Upon payment of the \$35,000 into escrow, the Lawsuit shall be dismissed. In the event the District is not formed or the Plaintiff Class otherwise cancels or terminates the Settlement Agreement, the \$35,000 held in escrow shall be returned to Ozark.

...

11. The closing on the real estate conveyance shall be conducted within 60 days of the date the conservancy district is established pursuant to I.C. 14-33-2-29.

...

Appropriate maintenance is an integral part of responsible dam ownership.³⁴ Dams require an on-going inspection and maintenance program to insure their continued safety and useful life.³⁵ Shireman Estates does not have a management structure in place to facilitate the assumption of these maintenance responsibilities. The proposed district appears to be necessary for the purpose of operation, maintenance and improvement of works of improvement, including Lake DeTurk and the Lake DeTurk dam and spillways.

Whether the proposed district holds promise of economic and engineering feasibility

The construction of the Lake DeTurk dam was permitted, after-the-fact, by the DNR's Division of Water. The Division of Water's file contains documents that indicate Lake DeTurk dam is a low hazard dam constructed by Grassyfork Fisheries, Co., Inc. to supply water for a goldfish hatchery.³⁶ Subsequently, the hatchery was purchased by Ozark Fisheries, Inc. In 2007, Holloway Engineering inspected Lake DeTurk, the dam and spillways, found and recommended:

...deterioration of the principal spillway discharge. Recent repairs have been made to the intake side but the discharge end needs immediate repairs. Also, there is seepage approximately 1/3 up the slope from the toe at what is believed to be a drawdown valve vault. Cause of this seepage must be investigated repairs performed to stop the seepage. It is recommended that the principal spillway system be video inspected so that a plan of repair and or replacement can be formulated.

A auxiliary spillway is located on the north side of the dam. This spillway is an earthen channel approximately 60 feet wide however its capacity has been drastically diminished by fill placed for the roadbed of Balliere Drive. While the spillway performed adequately during the intense rainfall event of 2008 it is doubtful that it would pass a larger event without damage to the spillway or dam. An alternative method for accommodating the roadway and increasing the capacity of the spillway should be investigated.

Petitioners' Exhibit 9, p. 1.

Testimony given indicates that Lake DeTurk's water level fluctuates during the course of the year. Notwithstanding rain events, there are two other incidences that impact Lake DeTurk's water level: (1) drawdown of water by Ozark Fisheries; and (2) seepage and leaks in the dam.³⁷ According to the Settlement Agreement, ¶5, Ozark holds a perpetual right to withdraw a reasonable amount of water from Lake DeTurk for use in its commercial fish operation, the terms of which are provided in an agreed upon Water Lease Contract. The Contract provides

4.0 Water Rights – Ozark

4.1 Ozark shall use and withdraw water from Lake DeTurk, by means of the existing pipes and valves, only for its commercial fish operations and only at the normal rate of usage. Ozark may sell, assign, transfer, or otherwise alienate such water rights together with the sale of the real estate appurtenant to the dam, subject to the District's easements.

4.2 Ozark shall have the right of reasonable access to Lake DeTurk and appurtenant real estate in order to maintain all of its water systems, including all pipes and valves.

³⁴ DNR Memorandum, p. 17 of this report.

³⁵ Indiana Dam Safety Inspection Manual, §1.1, p. 1-1.

³⁶ DNR Memorandum, p. 16 of this report.

³⁷ Testimony of Holloway, p. 9 of this report.

4.3 Ozark shall not withdraw water so as to lower the level of Lake DeTurk more than three (3) feet below the established normal pool stage, as such term is defined by the Indiana Department of Natural Resources. The District and Ozark may install, maintain and mutually control a valve or valves on all pipes or drains used by Ozark to provide Ozark with its fresh water supply from Lake DeTurk.

4.4 Ozark may request relieve from the water level limitations (Sec. 4.3) due to exigent circumstances, i.e., drought. All such requests shall be made to the Board of Directors of the District, which approval shall not be unreasonably withheld. ...

4.5 District shall provide Ozark prior written notice of at least thirty (3) days in advance of its intent to draw down the water level or drain the lake for maintenance and repairs; ...

5.0 Water Right – District

5.1 One of the purposes of the District is to maintain and preserve the aquatic health of Lake DeTurk and its ecosystem. The District shall enjoy the free use of Lake DeTurk and its appurtenances, subject only to Ozark’s rights under this Water Contract. The District may restore, repair, maintain and improve the lake, dam, spillway, or anything appurtenant, including the easements for spillway, overflow and drainage on Ozark’s real estate.

6.0 Termination

6.1 Voluntary – Ozark Ozark may surrender, abandon or terminate its water rights under this agreement at any time. ...The termination of Ozark’s water rights for any reason does not affect District’s easement rights for spillway, drainage or overflow.

6.2 District The District is obligated to provide Ozark water withdrawal rights, as set forth herein, so long as Ozark continues the operation of a commercial fish operation upon the real property immediately adjacent and to the east of Lake DeTurk.

...

8.0 Remedies

The parties may enforce their rights by injunctive relief, an action of damages, or arbitration, if permitted.

...

9.3 Successor and Assigns

This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors, legal representatives and assigns.

...

Petitioners’ Exhibit 2, Water Lease Contract

According to the Settlement Agreement and Water Lease Contract, Ozark is responsible for the maintenance and repair of systems necessary for the withdrawal of water from Lake DeTurk. Ozark would also be responsible for the repair of any leakage attributable to its water withdrawal system. A series of Ozark fishery ponds are located at the toe of Lake DeTurk dam, which causes the area to be constantly saturated.³⁸ The extent of any seepage at the toe of the dam is unknown, but in order to conduct an inspection the ponds would need to be drained.³⁹

The Petition is not conditioned upon either a grant of federal or state funds. Petitioners know of no grants, either state or federal, presently available; however, if such a grant would become available, all conditions would be considered to accomplish the purpose in the most economical

³⁸ Testimony of Holloway, p. 9 of this report.

³⁹ *Id.*

manner.⁴⁰ Maintenance, repair and operation of the works of improvements necessary..., but not limited to Lake DeTurk, the dam, and spillway shall, be paid for by both annual levy of special benefit taxes and an annual assessment on land found to be exceptionally benefitted; or by another method provided by statute.⁴¹ The cumulative maintenance fund required under IC 14-33-14-4 would ensure that the works of improvement are adequately maintained.

A dam safety inspection performed on a regular basis is one of the most economical means a dam owner can use to assure the safety and long life of a dam and its immediate environment.⁴² The conservancy district as a mechanism for the operation, maintenance, and improvement of lakes and dams is a proven method and holds promise of economic and engineering feasibility.

Whether the proposed district seems to offer benefits in excess of costs and damages

Total cost for repair and rehabilitation of the dam, lake and recreational areas is estimated to be \$1,450,000 to \$1,500,000; annual maintenance cost of the lake and recreational parks is estimated at \$25,000. In the event of the loss of Lake DeTurk and the other recreational amenities, it is estimated the loss in property values would be \$4,000,000. Removal of the silt would improve the quality of the lake and benefit the recreational activities. The amount of silt to be removed, method of removal, and location of a disposal site could cost as much as \$900,000 and make this project too costly in the short term. Therefore the siltation issue may need to be addressed in phases or considered a future project.⁴³

The assumption can be made that those wishing to live in a “lake environment” are willing to “pay” the costs necessary to maintain the lake. The residents within the proposed conservancy district along with those living in the surrounding area will benefit from the improvements. Recreational opportunities will continue, and perhaps, be enhanced through increased safety and integrity of the Lake DeTurk dam.

The use a conservancy district is a proven mechanism for managing the operation, maintenance, and improvement of lakes and dams. The proposed conservancy district holds promise of economic and engineering feasibility for maintaining the works of improvement, contingent upon the district having a geographic scope that makes feasible the performance of needed inspections, repairs, and maintenance of the earthen dam, control structures, and facilities downstream that can compromise the integrity of the dam or control structures. This scope must authorize entry upon properties of Ozark Fisheries adjacent to or downstream of the earthen dam and control structures, for the purposes of performing inspections and implementing repairs or design modifications, including the drainage of fishery ponds as reasonably directed by a professional engineer.

The conservancy district and Ozark Fisheries seek, by contract, to define their mutual rights to use and withdraw water from Lake DeTurk. The contract does not negate economic or

⁴⁰ Petition, ¶7, p. 2.

⁴¹ *Id.*, ¶8, p. 2

⁴² Indiana Dam Safety Inspection Manual, §2.1, p. 2-3.

⁴³ DNR Memorandum, p. 20 of this report.

engineering feasibility of the proposed district. If the district is formed, it should be with the understanding that other riparian owners and the Department of Natural Resources, in its regulatory capacity, have independent standing pertaining to water rights which would not be foreclosed.

Whether the proposed district proposes to cover and serve a proper area

The territory to be included in the Lake DeTurk Conservancy District will include Lake DeTurk, the dam, spillway, and appurtenances, all real property adjoining Lake DeTurk and all platted lots in Shireman Estates, a subdivision in the City of Martinsville.⁴⁴

Any area may be established as a district if each part of the district is contiguous to another part. The area within the proposed district boundaries, and as depicted in the proposed conservancy district boundary map, NRC-Hearings' Exhibit A, submitted by Petitioners and attached to this report, appears to be contiguous.

Whether the proposed district could be established and operated in a manner compatible with established: conservancy districts; flood control projects; reservoirs; lakes; drains; levees; and other water management or water supply projects

Evidence presented by the Petitioners as well as state agency comments filed during this proceeding establish there does not exist, near the proposed district boundaries, a water management or a water supply project with which the Lake DeTurk Conservancy District would interfere.

Dated: November 1, 2011

Jennifer M. Kane
Hearing Officer
Natural Resources Commission

⁴⁴ Petition, ¶4, p. 2.

A copy of the foregoing was sent to the following:

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